UNITED STATES BANKRUPTCY COURT
WESTERN DISTRICT OF NORTH CAROLINA
CHARLOTTE DIVISION

In re BESTWALL LLC,[1] Debtor.	Chapter 11 Case No. 17-31795 (LTB)

DEBTOR'S OBJECTION TO OMNIBUS MOTION TO RECONSIDER THE SCOPE OF *EX PARTE* ORDERS APPROVING EMPLOYMENT OF: (I) KING & SPALDING LLP AND (II) SCHACHTER HARRIS LLP

The above-captioned debtor and debtor-in-possession (the "Debtor") hereby files this Objection to the *Omnibus Motion to Reconsider the Scope of Ex Parte Orders Approving Employment of Each of: (I) King & Spalding LLP and (II) Schachter Harris LLP as Debtor's Special Counsel Pursuant to Section 327(e) of the Bankruptcy Code Effective as of the Petition Date* [Docket No. 192] (the "Motion") filed by the Official Committee of Asbestos Claimants (the "ACC"). In support of this Objection, the Debtor respectfully represents as follows:

PRELIMINARY STATEMENT

1. By its Motion, the ACC requests that the Court reconsider (a) its *ex parte* order approving the retention of King & Spalding LLP ("K&S") as special counsel to the Debtor [Docket No. 36] (the "K&S Order") and (b) its *ex parte* order approving the retention of Schachter Harris LLP ("Schachter" and, together with K&S, the "Professionals") as special litigation counsel to the Debtor [Docket No. 38] (the "Schachter Order" and, together with the K&S Order, the "Retention Orders").

[1] The last four digits of the Debtor's taxpayer identification number are 5815. The Debtor's address is 100 Peachtree Street, N.W., Atlanta, Georgia 30303.

2. More specifically, with respect to the K&S retention, the ACC seeks to: (a) dramatically limit its scope so that K&S may assist only with matters unrelated to a possible estimation proceeding and (b) condition K&S's retention on "the understanding and expectation that its lawyers are likely to be examined and called as witnesses with respect to K&S' pre-petition services."[2] With respect to Schachter's retention, the Motion requests that the Court: (a) deny Schachter's retention outright; or (b) in the alternative, (i) limit Schachter's retention to matters other than medical and science issues or issues as to which they could be fact witnesses and (ii) condition Schachter's retention on the "understanding and expectation" that its lawyers would be called to testify with respect to Schachter's prepetition services.[3]

3. Denying the Debtor access to representation of its choice, including by curtailing the role of such counsel, requires compelling justification. Here, the ACC has offered no valid factual or legal justification for that relief, much less a compelling one. Notably, the ACC provides no fact-based challenges to the qualifications of K&S and Schachter, and does not identify any adverse interest created by the Professionals' retention. Further, despite the ACC's focus on the possible future testimony of the Professionals in connection with an estimation trial, the Motion does not demonstrate that testimony by lawyers at K&S or Schachter would be necessary under applicable law or rules, nor that any such speculative future testimony, if somehow needed, would create a conflict or legitimate concern. In fact, the ACC's arguments either are without legal merit or are premised on misstatements or misunderstandings of the facts.

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[2] Motion, ¶ 6.

[3] Motion, ¶¶ 11, 12. The form of order attached to the Motion as Exhibit B expresses no preference for the form of relief, but merely states that the parties will work to prepare "a form of order consistent with the Court's rulings made at the Hearing." Id. at Ex. B, ¶ 2.

4. Far from seeking to remedy any actual and identified risks associated with the Professionals' retention by the Debtor, the Motion instead is a transparent attempt to hamstring the Debtor's ability to pursue an estimation proceeding in the event that one is needed. Indeed, the Motion is part of an attack on the entire legal team of the Debtor.[4] Although the Debtor is committed to pursuing a prompt and consensual resolution of this chapter 11 case, and is working with the ACC to that end, it remains unclear whether a consensual resolution will be possible. If it is not, the Debtor will pursue an estimation of its asbestos liabilities, as is typical in asbestos bankruptcy cases. In the event of an estimation trial, the services of experienced counsel with relevant background and expertise will be paramount. The Court should not permit the ACC—the likely primary adversary in any estimation proceeding—to undermine the Debtor's ability to prepare and present its estimation case before it even begins.

5. The requests in the Motion rest on two primary arguments: first, that the Professionals' historical roles make them critical fact witnesses in any estimation trial, and this justifies limiting their roles as Debtor's counsel; and second, that the medical and science evidence that the Debtor would present in an estimation hearing by and with the assistance of Schachter is wholly irrelevant to estimation of its asbestos liability and, therefore, Schachter's retention is not in the best interest of the Debtor's estate. Both of these arguments fail.

6. As described in further detail below, even if K&S and Schachter attorneys were required to serve as fact witnesses in a potential estimation trial, the participation of individual lawyers as witnesses would not raise issues regarding the firms' retention under section 327 of title 11 of the United States Code (the "Bankruptcy Code"). The relevant rules

[4] In addition to the Motion, the ACC filed a motion [Docket No. 193] that similarly seeks to modify the orders approving the retention of (a) Jones Day, the Debtor's chapter 11 counsel, and (b) Robinson, Bradshaw & Hinson, P.A. ("Robinson Bradshaw"), special counsel to the Debtor for asbestos claims estimation matters and local bankruptcy counsel.

also would not preclude the testifying lawyers from assisting the Debtor with preparations for the estimation trial or otherwise participating in such a trial.

7. In any event, the Debtor has no reason to believe that the Professionals' attorneys will be called as witnesses in the Debtor's chapter 11 case. Their testimony is not necessary under applicable legal standards. Importantly, the Professionals did *not* serve in the historical roles that the ACC mistakenly alleges would require their testimony (i.e., they never served as national coordinating counsel nor developed or implemented settlement protocols). Therefore, the Professionals' attorneys are not qualified to testify to the matters identified in the Motion, and any testimony they could provide would be redundant of testimony of other, more appropriate potential witnesses. Further, much of the testimony that the ACC would seek from the Professionals, as previewed in the Motion, would be protected by attorney-client privilege. Most importantly, these purely speculative concerns about possible future testimony are not sufficient to require any limitations on the Professionals' retentions today and can be addressed when and if needed in the future based on the facts and circumstances at the time.

8. The ACC's contention that medical and science evidence is irrelevant to estimation also is unfounded both under state law and in bankruptcy estimation cases. Medical and science evidence is an element of every state court case and has been integral to estimation proceedings in similar chapter 11 cases. The ACC misconstrues the bankruptcy court's holding in In re Garlock Sealing Technologies, LLC[5] when it suggests otherwise, and cites that holding out of context. Regardless, the ACC will have an opportunity to argue whether and to what extent medical and science evidence is relevant to an estimation trial if, in fact, one is held in this case. Until that time, it is premature to limit the Debtor's right and ability to develop and present

[5] In re Garlock Sealing Techs., LLC, 504 B.R. 71 (Bankr. W.D.N.C. 2013) (hereinafter, "Garlock").

the case that it wishes to present by limiting its representation by counsel knowledgeable in these issues.[6]

RELEVANT BACKGROUND

Background Regarding the Debtor

9. As of the commencement of this chapter 11 case on November 2, 2017 (the "Petition Date"), the Debtor was a defendant in tens of thousands of asbestos-related lawsuits pending in the courts of nearly every state and certain territories of the United States. On the Petition Date, the Debtor filed the *Informational Brief of Bestwall LLC* [Docket No. 12] (the "Informational Brief") to provide additional information about its asbestos-related liabilities and litigation, as well as the Debtor's plans to address these matters in this chapter 11 case. In addition, the Debtor provided a comprehensive description of the Debtor, its history, its assets and liabilities and the events leading to the commencement of this chapter 11 case in the declaration of Tyler L. Woolson [Docket No. 2] (the "First Day Declaration"), also filed on the Petition Date.

10. As further described in the First Day Declaration, prior to the Petition Date, on July 31, 2017, the Debtor's predecessor, Georgia-Pacific LLC ("Old GP"), underwent a corporate restructuring (the "2017 Corporate Restructuring") in which Old GP ceased to exist and two new entities were formed—(a) the Debtor and (b) its non-debtor affiliate, Georgia-Pacific LLC, a Delaware limited liability company ("New GP"). As part of the 2017 Corporate Restructuring, the Debtor succeeded to certain assets of Old GP and became solely

[6] In addition to these two primary lines of argument, the ACC vaguely suggests that the Court should reconsider the Retention Orders on account of a possible conflict of interest with the Debtor, although it has no basis to believe that any conflict of interest exists. Motion, ¶¶ 32, 62. This allegation of a conflict is speculative, unsupported and wholly insufficient to impose limitations on the Debtor's access to its chosen counsel.

responsible for Old GP's asbestos-related liabilities (with the exception of certain claims covered by workers' compensation statutes and other similar laws). Despite the ACC's characterization of the Debtor as an entity "with limited assets,"[7] the assets that Old GP assigned to the Debtor (including a funding agreement with New GP) ensure that the Debtor has the same financial resources and ability to satisfy asbestos claims as Old GP had prior to the restructuring.

The Retention Applications

11. On the Petition Date, the Debtor filed *ex parte* applications seeking to retain (a) K&S as special counsel to the Debtor [Docket No. 27] (the "K&S Application") and (b) Schachter as special litigation counsel to the Debtor [Docket No. 28] (the "Schachter Application" and, together with the K&S Application, the "Retention Applications"). The Professionals' retention is necessary and appropriate to provide assistance to the Debtor on asbestos claim-related matters, including a possible future estimation trial. The Professionals are particularly well qualified for this role due to their relevant prepetition work for the Debtor and related institutional knowledge. The Court approved the Retention Applications by entering the Retention Orders on the Petition Date.

12. As Exhibit A to the K&S Application, the Debtor filed the *Declaration of Richard A. Schneider* (the "Schneider Declaration") that describes: (a) K&S's qualifications, including as developed through the firm's prepetition representation of the Debtor and its predecessor; (b) the matters with which K&S may assist the Debtor in this chapter 11 case; and (c) K&S's disclosures demonstrating that the firm does not represent or hold any interest adverse to the Debtor or its estate with respect to the matters for which it is being employed. As set forth in the K&S Application, K&S's primary prepetition roles were to "serve[] as lead counsel on

[7] Motion, ¶ 2.

various discovery issues that arose in multiple jurisdictions with respect to the defense of asbestos litigation" and to "serv[e] as lead counsel for preparing and defending company witnesses addressing scientific issues." K&S Application, ¶ 9. Neither of these roles regularly involved engaging in settlement negotiations or advising Old GP on the settlement of individual asbestos cases. During the period from July 31, 2017 to November 1, 2017, K&S also assisted the Debtor in a limited number of settlement discussions on a handful of cases.

13. Similarly, the Debtor filed, as Exhibit B to the Schachter Application, the *Declaration of Raymond P. Harris, Jr.* (the "Harris Declaration" and, together with the Schachter Declaration, the "Retention Declarations"), which similarly sets forth: (a) Schachter's qualifications; (b) the matters with which Schachter may assist the Debtor in this chapter 11 case; and (c) Schachter's disclosures demonstrating that the firm does not represent or hold any interest adverse to the Debtor or its estate with respect to the matters for which it is being employed. The Harris Declaration also describes Schachter's prepetition services to the Debtor and Old GP, which "included assisting in the coordination of science experts engaged by Debtor, conducting discovery of experts employed by plaintiffs and assisting in briefings and other pleadings regarding the merits of plaintiffs' claims and Debtor's defenses." Harris Declaration, ¶ 3.

14. Despite these disclosures, the ACC's Motion relies on certain incorrect facts and assumptions regarding the scope and nature of prepetition services provided by the Professionals. For example, the Motion incorrectly states that Schachter served as national coordinating counsel[8] for Old GP's asbestos-related litigation. Schachter never served in that

[8] Motion, ¶ 10 ("Further, in any estimation proceeding, Schachter lawyers will be important fact witnesses as concerns its services as National Coordinating Counsel for Georgia-Pacific Asbestos Liabilities in the three years before this case.")

role and neither the Harris Declaration nor the Schachter Application indicate that it did.[9] Similarly, the Motion presumes that K&S had a role in "establishing settlement protocols and values."[10] K&S, however, was not involved in developing settlement protocols and procedures regarding Old GP's and the Debtor's asbestos-related cases.

ARGUMENT

Retention of the Professionals Under Section 327(e)

15. It is a long-standing rule that a party's choice of counsel is entitled to great deference, and in a bankruptcy "the choice of the trustee should be confirmed unless good reasons appear to the contrary." Kantar v. Robertson, 102 F.2d 92, 93-94 (4th Cir. 1939); see also In re Universal Enters. of W. Va., LLC, No. 09-2862, 2010 WL 2403354, at *1 (Bankr. N.D. W. Va., June 9, 2010) ("Absent a disqualifying interest, a court should not deprive a Chapter 11 debtor of its chosen counsel inasmuch as the attorney-client relationship is 'highly confidential, demanding personal faith and confidence' and the relationship requires the estate and its attorney 'work harmoniously.'") (citing In re Mandell, 69 F.2d 830, 831 (2d Cir. 1934)). For these reasons, "motions to disqualify a lawyer … are generally viewed with disfavor in deference to a party's right to choose her own counsel." Metro. P'ship, Ltd. v. Harris, No. 3:06CV522-W, 2007 WL 2733707, at *2 (W.D.N.C. Sept. 17, 2007).

16. Here, the Retention Applications seek the retention of K&S and Schachter pursuant to section 327(e) of the Bankruptcy Code. The relevant factors for retention under

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[9] Typically, national coordinating counsel's role in asbestos litigation is to oversee and coordinate the defense of all asbestos cases nationwide with responsibility to, among other things, supervise, direct and coordinate (a) the factual investigation and workup of cases, (b) the management and coordination of discovery, (c) the preparation of witnesses for deposition and trial, (d) the retention and workup of experts in all relevant areas, (e) the overall preparation of cases for trial and (f) the negotiation and settlement of cases. As noted, Schachter's role in the Debtor's asbestos litigation was much more limited, focusing only on the science evidence offered by plaintiffs and by the Debtor and Old GP.

[10] Motion, ¶ 28.

section 327(e) of the Bankruptcy Code are: (a) that the "special purpose" of retained counsel is defined; (b) that the special purpose role is outside the scope of generally "conducting the case;" (c) that retention is in the best interest of the estate; and (d) that counsel does not hold an interest that is adverse to the debtor or its estate in the matters for which it is to be employed. 11 U.S.C. § 327(e); see also In re Sea Trail Corp., No. 11-007370-8-SWH, 2011 WL 6140514, at *1 (Bankr. E.D.N.C. Dec. 9, 2011).

17. The Professionals meet all of the standards to be retained under section 327(e) in this case, and the Motion does not raise any legitimate issues to the contrary.[11]

The Professionals' Retention Is in the Best Interests of the Estate

A. The Professionals Possess Important Knowledge and Experience Regarding Asbestos-Related Litigation

18. Retention of counsel under section 327(e) of the Bankruptcy Code is generally "appropriate in situations where the debtor was involved in complex litigation prior to the bankruptcy filing and replacing the prepetition attorney would be disruptive and inefficient." In re Land, No. 13-11309, 2014 WL 7330481, at *3 (Bankr. M.D.N.C. Dec. 18, 2014) (citing In re J.S. II, LLC, 371 B.R. 311, 321 (Bankr. N.D. Ill. 2007) (authorizing retention of attorney who was "familiar with the [relevant] facts and issues" where "[h]iring new counsel would cause the estate to incur expenses to bring new counsel up to date…."); In re Cockings, 195 B.R. 735, 737 (Bankr. E.D. Ark. 1996) ("Hiring an attorney who is already familiar with the litigation ... clearly is in the best interest of the estate.")).

19. For example, in In re Land, the Bankruptcy Court for the Middle District of North Carolina found that retention of an attorney as special counsel to appeal a ruling on

[11] The Motion does not challenge that a special purpose for the Professionals has been identified or assert that these firms will be serving as bankruptcy counsel or otherwise conducting the case. The issues raised by the Motion relate to the retentions being in the best interests of the estate and alleged potential conflicts.

prepetition litigation was in the best interest of the estates because the attorney's experience representing the debtors in prior appeals made him "uniquely qualified" for the job. Id. at *4. In particular, due to his "advantage of already being familiar with the record" on appeal, he could "pinpoint any possible issues more expeditiously" than another lawyer without the same experience. Id.

20. Retention of the Professionals to assist with asbestos-related matters is similarly in the best interest of the Debtor here. The institutional knowledge that the Professionals have developed over years of representing the Debtor and its predecessor is integral to the Debtor's chapter 11 case, including in any future estimation proceeding. Through their prepetition representation of the Debtor and Old GP, K&S and Schachter have developed in-depth knowledge of the complex factual and legal history of the Debtor's and Old GP's asbestos litigation, related expert testimony and the product history of the Debtor's predecessors. Schachter also has become intimately knowledgeable about the key science issues that arise in the context of the Debtor's asbestos litigation, having become familiar with the voluminous and complex science literature and key documents after years of effort. On account of their experience and knowledge, the Professionals will be able to identify and analyze key issues more effectively and efficiently than any replacement counsel.

21. The ACC's suggestion that the retention of Robinson Bradshaw makes retention of the Professionals for estimation matters unnecessary ignores the key facts that (a) Robinson Bradshaw's proposed services related to potential estimation proceedings do not overlap with the services to be provided by the Professionals; and (b) Robinson Bradshaw does not have the same depth of knowledge or experience as the Professionals with respect to the Debtor's historic litigation and related medical and science issues.

22. If the Professionals' retention is denied or limited as requested in the Motion, the Debtor would need replacement counsel to assist with historic asbestos litigation and science matters. It would be extremely time consuming and expensive to bring new counsel up to speed on such matters prior to a potential estimation trial. Such an effort would waste estate resources, achieve no valid purpose under the law and only serve to place the Debtor at a tactical disadvantage compared to the ACC. The ACC's claim that the Debtor would not be prejudiced by limiting or denying representation by the uniquely qualified counsel of its choosing[12] is simply incorrect.

B. Schachter's Knowledge of Medical and Science Issues Will Be Integral to Any Estimation Proceedings

23. The ACC's claim that Schachter need not be retained because medical and science evidence relating to asbestos claims is irrelevant to an estimation trial is incorrect and misconstrues cited precedent.[13] In fact, medical and science evidence is relevant in state law actions and has been central to recent estimation trials in this and other districts.[14] The Debtor believes that medical and science evidence would be an important part of any estimation proceedings in its chapter 11 case, as well. Consequently, the retention of experienced and knowledgeable medical and science counsel clearly is in the estate's best interest.

24. The ACC suggests that science and medical evidence is irrelevant for three main reasons. First, the ACC argues that evidence of the science underlying the Debtor's

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12 Motion, ¶ 67.

13 See Motion, p. 12 ("Schachter's Experience with regard to the Medical Science Relating to Chrysotile is Irrelevant for Purposes of an Aggregate Estimation of the Georgia-Pacific Asbestos Liability").

14 See, e.g., Garlock, 504 B.R. at 75-82 (summarizing the large body of evidence presented to, and considered by, the bankruptcy court in the debtors' asbestos liability estimation trial, including evidence from experts in epidemiology, medicine, industrial hygiene and economics, among other sciences); see also In re USG Corp., 290 B.R. 223, 227 (Bankr. D. Del. 2003) (stating that, subject to the claimants' constitutional and legal rights, the debtors may "attack certain medical evidence under Federal Rule of Evidence 702 and [Daubert]").

case is not necessary because asbestos liabilities should be estimated based on the Debtor's settlement history.[15] However, if a consensual settlement is not feasible, the Debtor intends to seek an estimation of *actual legal liability* and not an estimate of its likely settlements if it were to remain in the tort system, where settlements have often been driven by other factors, such as incomplete information and avoidance of burdensome litigation costs. To pursue such an estimation, the Debtor expects that it will offer evidence on medical and science issues, including as described in the Informational Brief with respect to the potency and exposure levels of chrysotile asbestos associated with its predecessor's products.[16] As further described in the Informational Brief, the Debtor anticipates that the evidence presented in any estimation proceedings would demonstrate the propriety of calculating estimated asbestos liability based on the legal liability of the Debtor, which is the analysis employed and accepted by the Court in Garlock, rather than based on historical settlement amounts.

25. Regardless, the Debtor respectfully submits that consideration of estimation methodologies is not necessary at this preliminary stage—before any estimation proceeding has even been commenced—in connection with the retention of counsel. The Court will, of course, evaluate the proposed methodologies based on appropriate briefing, arguments and evidence presented, if and when any estimation proceedings commence.[17] By requesting that Schachter's retention be denied because science evidence is allegedly irrelevant, the ACC

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15 Motion, ¶ 55 (noting that the Specialty Products court "based its estimation on the debtor's settlement history").

16 Informational Br., § III.

17 See Order for Estimation of Mesothelioma Claims at 8, In re Garlock Sealing Techs. LLC, et al., Case No. 10-31607 (Apr. 13, 2012) [Docket No. 2102] (explaining that the court will hear evidence on competing estimation methodologies and "make its decision based upon which is the more persuasive").

effectively seeks a premature ruling supporting its theory of estimation that is not properly before the Court and not ripe for adjudication.

26. Second, the Motion suggests that the Court must apply state law in estimation proceedings and, therefore, the introduction of medical and science evidence is not necessary because "[s]tate tort law is well developed" on issues of chrysotile asbestos.[18] The ACC has not even attempted to demonstrate that state law is settled as to each medical and science issue relevant to estimation. To determine legal liability, the Court must "tak[e] into consideration causation."[19] Causation is an element of tort liability under the laws of every jurisdiction in the United States; therefore, evidence about causation is relevant no matter what law applies. Without addressing the details here, the Debtor submits that the presentation of science and medical evidence is expected to be integral to the Debtor's case regarding causation (as it was in Garlock). To the extent the ACC disagrees with this approach, it will have the right and opportunity to address the relevance and merits of any evidence presented in any future estimation proceedings. For now, the Debtor should be permitted to pursue the approach to estimation that it believes is appropriate (consistent with substantial precedent) with the assistance of the qualified and disinterested counsel of its choosing.

27. Third, to support its position that medical and science evidence is irrelevant to an estimation proceeding, the ACC relies on a quote from Judge Hodges' decision in Garlock that has been taken out of context. Garlock in no way stands for the proposition that medical and science evidence is irrelevant to estimation—to the contrary, the decision underscores the importance of such evidence when determining liability. According to the

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[18] Motion, ¶ 48.

[19] Garlock, 504 B.R. at 73.

Court, the parties to Garlock's estimation proceeding "made an extensive offering of scientific evidence on a number of topics," including: "(a) the nature of asbestos, its different types and their relative toxicity; (b) the medical evidence of the operation of asbestos in the lungs; (c) uses of asbestos in Garlock and other third-parties' products in naval and industrial applications; (d) industrial hygiene and epidemiology evidence of exposure caused by Garlock and third-parties' products; and (e) safety and regulatory pronouncements regarding asbestos exposure." Garlock, 504 B.R. at 75. As Judge Hodges explained, medical and science evidence was relevant to the estimation of Garlock's present and future asbestos-related liabilities because "[t]he best evidence of Garlock's aggregate responsibility is the projection of its legal liability that takes into consideration causation, limited exposure and the contribution of exposures to other products." Id. at 73.

28. The quotation cited in the Motion is merely a snippet from Garlock's lengthy discussion of the medical and scientific evidence, and that snippet was quoted without proper context.[20] The quoted portion touches on only one of the many medical and scientific issues that were relevant to Garlock's estimation: whether low dose chrysotile can *ever* cause mesothelioma. The court declined to decide that specific issue, but did not decline to consider the medical and science evidence. The entire paragraph including the ACC's quoted language reads as follows:

> In, conclusion: The court does not believe that it is necessary for it to determine — one way or the other — whether low dose exposure to chrysotile in Garlock gaskets could cause mesothelioma. Because the court is estimating Garlock's aggregate asbestos liability across all cases, it is sufficient to conclude that Garlock has demonstrated that its products resulted in relatively low exposure of a relatively

[20] Motion, ¶ 52 ("…[in determining an estimation of liability,] the [Garlock] Court concluded that it was unnecessary to make a determination on the toxicity of chrysotile. Specifically, the Court stated that 'it is [not] necessary for it to determine—one way or the other—whether low dose exposure to chrysotile in Garlock gaskets could cause mesothelioma.'").

> lower potency asbestos to a limited population and that the population exposed to Garlock's products was necessarily exposed to far greater quantities of higher potency asbestos from the products of others.

Garlock, 504 B.R. at 82.

29. When viewed in context, it is apparent that Judge Hodge's conclusion is not a holding that science and medicine were irrelevant to the estimation. It is quite the opposite, as Garlock relies on significant amounts of medical and scientific evidence regarding product exposure levels and the relative potency of various types of asbestos to estimate the debtor's aggregate liability for mesothelioma claims.

The Professionals Do Not Hold Interests Adverse to the Estate in the Matters for Which They Are Being Retained

30. In the context of section 327(e) of the Bankruptcy Code, an "adverse interest" that could result in denial of a retention refers to "either an actual or a reasonably probable conflict of interest." J.S. II, L.L.C., 371 B.R. at 321 (citing In re AroChem Corp., 176 F.3d 610, 700 (2d Cir. 1999)). As a result, "conflicts based purely on conjecture or mere speculation do not necessarily warrant an attorney's disqualification," in particular because other sections of the Bankruptcy Code can protect debtors' estates in the event that "potential conflicts ripen into actual adverse interests." Id.; accord Universal Enters. of W. Va., LLC, 2010 WL 2403354, at *3 (authorizing retention and applying a "wait and see" approach to an alleged potential conflict); Daly v. Konover Constr. Corp. (In re Homesteads Cmty. at Newtown, LLC), 390 B.R. 32, 47 (Bankr. D. Conn. 2008) ("The disqualifying adverse interest addressed in § 327 is either an actual or a reasonably probable conflict of interest.").[21]

[21] It also is notable that section 327(e) of the Bankruptcy Code sets a "more relaxed conflict-of-interest standard than is found in section 327(a)" of the Bankruptcy Code in that section 327(e) requires only that counsel not have an interest adverse to the estate "with respect to the matter on which such attorney is to be employed." DeVlieg-Bullard, Inc. v. Natale (In re DeVlieg, Inc.), 174 B.R. 497, 503 (N.D. Ill. 1994).

31. The Professionals have amply demonstrated in the Retention Applications and the Retention Declarations that they are disinterested and do not hold interests adverse to the Debtor or its estate. Indeed, the ACC alleges no conflict of interest here. Despite the ACC's claim to the contrary,[22] the Motion does not present the Court with any new "facts and circumstances" that were not included in the Debtor's filings on the Petition Date, and does not present any information to suggest an undisclosed conflict.

32. All the ACC offers to suggest a potential future conflict are arguments based on fundamental misunderstandings of the roles of the Professionals and the state of the law. In particular, the ACC appears to suggest that a potential conflict of interest could arise in the future on account of: (a) the possibility that certain unspecified attorneys at K&S or Schachter could be called as fact witnesses in an estimation trial;[23] or (b) some other basis that the ACC did not identify or explain further.[24] As addressed in detail below, the ACC's claim that certain individual K&S or Schachter attorneys could serve as fact witnesses is factually flawed and does not constitute grounds to deny the Professionals' retention as qualified law firms under section 327(e). With respect to the other as-yet-undefined potential conflict alluded to by the ACC, it is far too speculative to constitute an adverse interest under section 327(e) of the Bankruptcy Code or to merit further response.

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22 See Motion, ¶ 72 (claiming that "reconsideration of the K&S Retention Order and the Schachter Retention Order should be granted because when presented with the K&S Retention Application and the Schachter Retention Application, the Court did not have the benefit of certain facts and circumstances which the [ACC] has detailed [in the Motion]").

23 Motion, ¶¶ 5, 10.

24 Motion, ¶ 32 ("it is possible that K&S' interests and the interest of the Debtor's estate could conflict"), ¶ 62 (the "possibility of a conflict of interest … could arise").

Even if Certain of the Professionals' Attorneys Were to Serve as Witnesses, There Is No Basis to Deny the Professionals' Retentions

33. The Motion ultimately seeks to bar the firms of K&S and Schachter from assisting with a possible estimation proceeding on account of potential testimony by certain unspecified individual attorneys from those firms. As detailed below, the arguments about individual lawyers at the Professionals' firms serving as witnesses is speculative and based on faulty assumptions. But, as a threshold matter, even *if* certain individual attorneys were to testify as fact witnesses, any such testimony would not limit the retention of the Professionals as law firms under section 327(e) of the Bankruptcy Code.

34. Applicable law is clear that the testimony of *select lawyers* does not, in itself, create a conflict of interest that disqualifies the *entire law firm* from representing the client and thus would not create an adversity for the firms under section 327(e) of the Bankruptcy Code. In fact, the ethical rules (and relevant case law) are explicit on this point. See Rule 3.7(b) of the North Carolina Revised Rules of Professional Conduct (the "Professional Rules") ("A lawyer may act as advocate in a trial in which another lawyer in the lawyer's firm is likely to be called as a witness unless precluded from doing so" by Professional Rules 1.7 and 1.9 regarding conflicts of interest with respect to current and former clients); accord Metro. P'ship, Ltd., 2007 WL 2733707, at *2 (finding no basis to disqualify an attorney's firm despite plaintiff's request to call attorney as potential witness); Duke Invs., Ltd. v. Amegy Bank (In re Duke Invs., Ltd.), 454 B.R. 414, 422-27 (Bankr. S.D. Tex. 2011) ("E]ven if [the lawyer who is called to testify] should be disqualified . . . the disqualification should not extend to [the entire firm]"); Am. Home Assurance Co. v. Ryan (In re Raytech Corp.), 319 B.R. 342, 345 (Bankr. D. Conn. 2005) (overruling an objection to a firm's continued representation of plaintiffs despite likely witness testimony from an attorney in that firm). Thus, absent an actual disabling conflict, there

would be no reason that the Professionals could not continue their representations of the Debtor even if certain individuals from their firms were called as fact witnesses.

35. Although the arguments about future disqualification of individual lawyers are largely irrelevant to the retention of their law firms under section 327(e) of the Bankruptcy Code, because those arguments are central to the Motion and raise unfounded concerns about future conflicts, they are addressed below.

The Professionals' Lawyers Are Not Anticipated to Be Fact Witnesses and Any Potential Testimony Would Not Justify Denial of Retention

36. The Motion leans heavily on (a) the suggestion that certain of the Professionals' attorneys may serve as fact witnesses in a possible estimation trial and (b) the ACC's conclusion that this possibility should preclude the retention of the Professionals for estimation-related matters, presumably due to an adverse interest.

37. The relief requested in the Motion constitutes, in essence, a request to disqualify the Professionals from representing the Debtor either altogether or with respect to any estimation trial. See DeVlieg, Inc., 174 B.R. at 504 (analyzing an objection to debtor's retention of counsel under section 327(e) of the Bankruptcy Code on the basis that counsel may be required to testify about its prior work for the debtor as tantamount to a disqualification request). Because motions to disqualify counsel are disfavored, "the moving party has a very high standard of proof in moving to disqualify an opposing party's counsel. It follows that a court should not disqualify a party's chosen counsel on imagined scenarios of conflict." Danzig Ltd., v. Inception Mining Inc., No. 5:17-CV-00018-RLV-DSC, 2017 WL 2569739, at *1 (W.D.N.C. June 13, 2017) (quoting Capacchione v. Charlotte-Mecklenburg Bd. of Educ., 9 F. Supp. 2d 572, 579 (W.D.N.C. 1998)).

38. Under Professional Rule 3.7, a lawyer may not be an advocate at trial if that lawyer is a "necessary witness," unless "(1) the testimony relates to an uncontested issue; (2) the testimony relates to the nature and value of legal services rendered in the case; or (3) disqualification of the lawyer would work substantial hardship on the client." N.C.R. Prof'l Conduct 3.7(a). In the Western District of North Carolina, "an attorney should only be disqualified as a 'necessary witness' if (1) the attorney will give evidence material to the issues to be determined, (2) the evidence cannot be obtained elsewhere, and (3) the testimony is prejudicial or may be prejudicial to the testifying attorney's client." Metro. P'ship, Ltd., 2007 WL 2733707, at *2 (citing Cunningham v. Sams, 161 N.C. App. 295, 298 (2003)); accord Danzig Ltd., 2017 WL 2569739, at *2; see also Ohio Cas. Ins. Co. v. Firemen's Ins. Co., 2008 LEXIS 12360, at *6 (E.D.N.C. 2008, Feb. 13, 2008) ("A necessary witness is one whose evidence is material to issues in litigation, and which cannot be obtained elsewhere."). If an attorney is deemed a "necessary witness," the Court then must determine whether any of the exceptions established under Professional Rule 3.7 apply. Metro. P'ship, Ltd., 2007 WL 2733707, at *2.

A. Any Effort to Seek Disqualification Is Premature

39. Whether any lawyer should be disqualified "is a matter best determined within the context of the [trial] itself" when the existence of an actual conflict may be evaluated. DeVlieg, Inc., 174 B.R. at 504 (noting that "[a]ttorney disqualification is a drastic measure which courts should hesitate to impose except when absolutely necessary") (citing Schiessle v. Stephens, 717 F.2d 417, 420 (7th Cir. 1983)). At this juncture, it is unclear if an estimation proceeding will be needed in this case. Even if so, the nature of any estimation and the related disputes have yet to be framed. Thus, denying the Debtor's retention of its chosen Professionals on account of potential testimony at a trial that may not occur (and relating to issues that may not arise even if there is a trial) is premature and inappropriate.

B. Testimony From the Professionals Is Not Necessary to the Debtor's Case

40. Similarly, premature disqualification of counsel is particularly inappropriate where it has not been (and cannot be) demonstrated that such counsel's testimony would be necessary even in the event of a future estimation trial. See, e.g., Fed. Deposit Ins. Corp. v. Kerr, 111 F.R.D. 476, 479 (W.D.N.C. 1986) ("the withdrawal of [counsel] from further representation of the [client] at this point is inappropriate because the [client] has not yet determined if [counsel's] testimony would be necessary at trial."); DeVlieg, Inc., 174 B.R. at 504 (noting that failure to refute claims that testimony may not be needed "is itself a failure to sustain [the] burden of demonstrating that disqualification is necessary").[25]

41. Here, the ACC argues that the Professionals' attorneys must testify at a future estimation trial based solely on a fundamental misunderstanding of the firms' historical roles. The ACC focuses on the need for testimony regarding how the defense and settlement of asbestos cases were managed and coordinated nationally[26] and on settlement protocols and decisions.[27] Contrary to the ACC's arguments in the Motion, neither K&S nor Schachter served as national coordinating counsel (or performed the typical services of that role, like preparing case evaluations or supervising the settlement of cases), and the Professionals were not involved

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[25] See also Bacote v. Riverbay Corp., 2017 U.S. Dist. LEXIS 35098, at *19, (S.D.N.Y 2017, Mar. 10, 2017) ("[N]o disqualification should occur until it is apparent the attorney's testimony is itself admissible and necessary because disqualification is highly prejudicial to the non-movant.") (internal citations omitted); Metro. P'ship, Ltd., 2007 WL 2733707, at *2 (denying a motion to disqualify counsel, in part because counsel "may or may not be called as a witness"); Moore v. Kumer (In re Adam Furniture Indus., Inc.), 191 B.R. 249, 261 (Bankr. S.D. Ga. 1996) (denying defendants' request to disqualify counsel where the defendants did not "provid[e] any evidence that [counsel] will have to take the witness stand").

[26] See Motion, ¶ 10 (relating to testimony of Schachter about its services as national coordinating counsel), ¶ 29 (stating K&S should be a witness with respect to "the management of the defense and settlement" of asbestos matters, similar to testimony provided by national coordinating counsel in Specialty Products), ¶ 60 (same for Schachter).

[27] See Motion, ¶ 28 (stating that "K&S' role in establishing settlement protocols and values" will be "at issue"), ¶ 59 (stating that testimony may be sought from Schachter regarding "information sought and considered in connection with settlement").

in establishing or implementing settlement protocols.[28] Thus, lawyers at K&S and Schachter are not proper witnesses on those matters, and the entire premise of the ACC's objection based on this argument fails.

42. It also is well settled that it is improper to disqualify counsel on the basis that they must provide testimony if their testimony simply would be cumulative or redundant of testimony available from other sources. See, e.g., Metro. P'ship, Ltd., 2007 WL 2733707, at *2 (denying a motion to disqualify counsel because counsel's testimony "is available from at least three other sources"); Chantilly Constr. Corp. v. John Driggs Co., Inc. (In re Chantilly Constr. Corp.), 39 B.R. 466, 473 (Bankr. E.D. Va. 1984) ("The debtor's 'need' to call members of [counsel's firm] to testify is alleviated by the fact that the attorney's testimony will be cumulative and in some instances redundant."). Therefore, even to the extent that K&S and Schachter attorneys may have relevant information about the issues identified in the Motion, and even if those topics required testimony in a future estimation proceeding (all of which is speculative), their testimony is not necessary because any such testimony, at best, would be redundant of testimony available from other, more appropriate sources (particularly since their testimony would be subject to and limited by attorney-client privilege).[29] The ACC does not explain why it could not seek such testimony from witnesses other than the Debtor's outside counsel, including

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[28] Those services were performed by Old GP's and the Debtor's in-house legal teams since 2005 and, before that, by other firms. As noted, K&S had a limited role assisting with a handful of settlements of the Debtor's asbestos cases after the 2017 Corporate Restructuring, but had no historical role in establishing or implementing settlement protocols or strategies.

[29] The ACC's claim that the Debtor put certain information "at issue," thus waiving such attorney-client privilege, is misplaced. The Motion states that the Debtor waived privilege by putting "at issue" the "evidence sought, received, and considered" with respect to settlement decisions when the Debtor stated in its Informational Brief that certain relevant exposure evidence was "hidden away in the bankruptcy trust system." Motion, ¶ 26. The Debtor in no way waived the bedrock protections of attorney-client privilege by observing that certain relevant information was unavailable due to the confidentiality restrictions established by bankruptcy trusts and did not comment on, nor put at issue, the Debtor's discovery process.

the individuals at the Debtor and Old GP who were directly involved in the management of the Debtor's asbestos liabilities.

43. The intent to call the Debtor's counsel as a witness or the need for counsel to testify, on their own, are not sufficient to establish a disqualifying conflict of interest. The Court "cannot disqualify plaintiff's counsel merely because an adverse party intends to call them as witnesses" because "[s]uch a rule, taken to its logical conclusion, would allow any party to deprive his adversary of the counsel of his choice simply by announcing an intention to question the adversary's attorney in open court." Stanwood Corp. v. Barnum, 575 F. Supp. 1250, 1251 (W.D.N.C. 1983). To disqualify counsel, courts in this District and others require "proof that the substance of counsel's testimony (if offered) will compromise [the client's] case." Id.; see also Adam Furniture Indus., Inc., 191 B.R. at 261 (denying disqualification for lack of evidence that counsel will provide testimony adverse to its client's interests). The Motion has not demonstrated, and cannot demonstrate at this premature stage, that any testimony required from the Professionals' attorneys would create an interest adverse to the Debtor.

44. Last, even where a lawyer *is* a necessary witness, the lawyer will not be disqualified from retention if disqualification would "work substantial hardship on the client." N.C.R. Prof'l Conduct 3.7(a)(3). Disqualification causes clients substantial hardship where (a) the client's attorney has a longstanding representation of the client or (b) the case is factually complex such that it would be time consuming and difficult to bring new counsel up to speed.[30] As

[30] See, e.g., United States v. Perry, 30 F. Supp.3d 514, 544 n.15 (E.D. Va. 2014) (denying disqualification request where counsel worked with the defendant for a year and a half and the case involved "hundreds of thousands of documents [and] a fact-intensive defense"); Raytech Corp., 319 B.R. at 344 (denying disqualification where the attorney had "extensive knowledge" of the underlying cases at issue, the attorney had represented the client for four years and it would take "a substantial amount of time for a substitute counsel to gain that same familiarity with the cases"); Chantilly Constr. Corp., 39 B.R. at 473 (denying disqualification where counsel performed approximately 1,000 hours of services for the client and the client "would have the very heavy burden of educating replacement counsel on all the activity which has transpired previously").

described above, disqualification of the Professionals almost certainly would cause considerable hardship on the Debtor and its estate.

C. K&S's Role in Defending Old GP in Prepetition Discovery Disputes Concerning Work Product Research Funded by Old GP Provides No Basis for Limiting K&S's Representation

45. As its final argument with respect to K&S's retention, the ACC argues that K&S lawyers may be fact witnesses at an estimation trial, or that their interests may conflict with the estate, on issues concerning certain scientific research and articles funded by Old GP (collectively, the "Science Articles"). Historically, plaintiffs in asbestos cases have called into question Old GP's role in commissioning the Science Articles, yet even the ACC concedes that the relevance of those events in this proceeding is "unclear."[31] Nevertheless, the ACC asserts that K&S lawyers are potential witnesses by incorrectly assuming that K&S was involved in the underlying events that could be relevant to a speculative future dispute about the Science Articles. The ACC's argument is factually unfounded, as well as premature in addressing events that may never become relevant here. As such, this argument provides no basis for limiting K&S's representation of the Debtor in this chapter 11 case.

46. After the Science Articles were published, K&S defended Old GP in various discovery disputes about these articles. Those disputes arose because various asbestos plaintiff firms sought to force the production of Old GP's privileged and work product documents by arguing that Old GP had engaged in improper conduct in connection with funding the scientific work and the publication of the related articles. K&S's role was strictly as defense counsel in these matters as disputes arose in various jurisdictions. K&S played no role whatsoever in the underlying events – it did not commission the research, it was not involved in

[31] Motion, ¶ 36.

the underlying research itself and it had no involvement in writing and publishing the articles that reported the results of the research. These facts simply do not make K&S a potential witness in any proceeding and do not create any conflict, actual or potential, between K&S and the estate.

47. This is neither the time nor the place to engage in a detailed response to the ACC's mischaracterizations of Old GP's conduct regarding the Scientific Articles because they are irrelevant to the issue of the K&S's retention. Nevertheless, the Debtor takes exception to the allegation that Old GP engaged in any improper conduct by funding the underlying research and calling on one of its in-house scientists to participate as a co-author in many of the Science Articles.[32] Although the ACC cites an opinion from a New York intermediate appellate court, the ACC does not mention that, based on the same factual record and legal arguments before the court in New York, at least four other courts denied copycat motions, finding that the movants did not make even the threshold showing needed to obtain *in camera* review, much less production, of Old GP's privileged and work product materials. See, e.g., Pitman v. Crane Co., No. 2012-10060 (Civ. Dist. Ct., Parish of Orleans, Louisiana, Aug. 14, 2013) (denying *in camera* review of Old GP's privileged information); see also In re All Shrader & Assocs., LLP Asbestos Personal Injury Cases v. Georgia-Pacific Corp., No. 95ASALLLIT (Ill. Cir. Ct., 3d Jud. Cir., Dec. 31, 2014) (same); Hale v. Trane U.S., Inc., No. C20133499 (Ariz. Super. Ct., Pima Cnty., Sept. 5, 2014) (same); Diaz v. Georgia-Pacific LLC, No. 15-CA-7291(Fl. Cir. Ct. 13th Jud. Cir., April 21, 2016) (plaintiffs' motion denied in chambers).

[32] Stewart Holm was an in-house scientist at Old GP and was a co-author of nine of the Science Articles. Every article he co-authored listed him by name and disclosed his affiliation with Old GP. Thus, any reader was or should have been aware of Holm's connection to Old GP and, thus, Old GP's connection to the articles (each one of which disclosed the source of its funding).

D. Even a Testifying Lawyer May Continue to Represent the Debtor

48. Finally, even if a testifying lawyer from K&S or Schachter ultimately cannot "act as advocate at a trial" for the Debtor under Professional Rule 3.7(a), that attorney nonetheless may be able to provide support to the Debtor with respect to that trial in other ways. This is particularly the case in chapter 11 proceedings, where there is little or no risk that the factfinder would be confused or prejudiced by the attorney's dual role as advocate and witness. See N.C.R. Prof'l Conduct 3.7, Cmt. 1, 5 (describing the need for Professional Rule 3.7 to eliminate this prejudice created for factfinders). This further demonstrates the flaws in the ACC's arguments to seek advance disqualification of the lawyers and their firms.

RESERVATION OF RIGHTS

49. In this Objection, the Debtor has responded to various arguments in the Motion based on the ACC's speculation about what may occur in a future estimation proceeding. In responding, the Debtor has attempted to clarify certain issues for the Court and provide appropriate context. However, nothing herein should be construed as limiting, waiving or prejudicing any rights or arguments that the Debtor ultimately may assert in connection with any estimation proceeding or otherwise. All such matters are fully reserved by the Debtor.

CONCLUSION

50. For the foregoing reasons, the Debtor respectfully requests that the Court deny the Motion and the relief requested therein.

Dated: February 15, 2018
Charlotte, North Carolina

Respectfully submitted,

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